BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CHARLES M. MCCORMICK, SR.	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,011,921
DANISCO USA INC.	)	
Respondent	)	
AND	)	
	)	
HARTFORD UNDERWRITERS INSURANCE	)	
Insurance Carrier	)	

ORDER

Claimant appealed the October 28, 2005, Award entered by Administrative Law Judge Robert H. Foerschler. The Board heard oral argument on February 7, 2006.

APPEARANCES

Steven R. Jarrett of Overland Park, Kansas, appeared for claimant. Tracy M. Vetter of Overland Park, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. In addition, the record includes the transcript of Carol Rethemeyer's August 15, 2005, deposition.

ISSUES

The parties agreed claimant injured his low back at work on January 29, 2003, while he was changing filters in some ventilating equipment. The parties also stipulated claimant's back injury arose out of and in the course of his employment with respondent. In the October 28, 2005, Award, Judge Foerschler awarded claimant a six percent permanent partial general disability under K.S.A. 44-510e based upon claimant's whole person functional impairment rating.

Claimant contends Judge Foerschler erred. Claimant argues he is realistically unemployable and, therefore, he should be granted permanent total disability benefits. In the alternative, claimant argues he has a work disability (a permanent partial general disability greater than the functional impairment rating) of either 93 or 71 percent, depending upon whether claimant's wage loss is deemed to be 100 percent or 56 percent.

Conversely, respondent and its insurance carrier contend the October 28, 2005, Award should be affirmed. They argue claimant, without justification, terminated his accommodated employment with respondent and, therefore, his permanent partial general disability benefits should be limited to his whole person functional impairment rating, which they contend is six percent.

The only issue before the Board on this appeal is the nature and extent of claimant's injury and disability.

FINDINGS OF FACT

After reviewing the record and considering the parties' arguments, the Board finds:

1. Respondent, which manufactures food ingredients, employed claimant as a packaging technician. On January 29, 2003, claimant injured his back at work while changing filters in some ventilating equipment. Claimant reported his injury to respondent and was referred for medical treatment. In February 2003, an MRI was taken of claimant's lumbosacral spine that showed a broad-based disc protrusion at L3-4, a small right paracentral disc protrusion at L4-5, and a mild disc bulge at L5-S1. Moreover, the MRI indicated moderate to high grade spinal stenosis and neural foraminal canal stenosis at L3-4 and L4-5 due to disc protrusion and combined with facet arthropathy and short pedicles.

2. The record is not entirely clear, but it does not appear claimant returned to his regular job duties at any time following the January 29, 2003, accident. Instead, respondent gave claimant the job of primarily operating an electric forklift as it was one of the lighter jobs in the plant. But on July 14, 2003, claimant reported to his then treating physician, Dr. Brian E. Healy, that he was having difficulty operating the forklift during his 12-hour work shifts. According to claimant, the doctor told him the forklift job was not light duty and the doctor pronounced him permanently and totally disabled. The doctor's July 14, 2003, office notes read in pertinent part:

> Charles M. McCormick Sr was back today. He has slowly gotten worse. He says the lightest duty they have for him is forklift driving. I do not think in light of his status that he is going to be able to do

> anything even sitting or standing for a period of time as I have noted previously.
>
> I think he has severe spinal stenosis. He is 61. He has significant cardiac issues and is not a good operative candidate. Does not want surgery secondary to the risks involved.
>
> RECOMMENDATIONS/PLAN: In light of that I am providing him with total permanent disability effective immediately as he does not feel that he can continue to work. I will see him back shoulder *[sic]* workers' comp request any kind of rating or further determination on him. Being a nonoperative candidate and having basically failed with epidural steroids, I feel there is no further treatment that is going to be able to return him go *[sic]* work or to normal function.[1]

Dr. Healy did not testify but his records were introduced at Dr. Chris E. Wilson's deposition.

3. When claimant presented papers from Dr. Healy that indicated claimant was permanently and totally disabled, both claimant's lead man and supervisor conveyed their condolences and wished claimant well. Again, the record is not entirely clear, but it appears claimant terminated his employment with respondent on July 14, 2003, or shortly thereafter. The record does not disclose the last day claimant actually performed work for respondent but it appears that date may have been July 13, 2003.

4. In August 2003, claimant saw board-certified orthopedic surgeon Dr. Chris E. Wilson for his low back complaints. As a result of that examination, the doctor initially considered a percutaneous nucleoplasty but the doctor recognized the procedure would represent excessive risk due to claimant's earlier multiple heart bypass procedures.

5. According to the medical records introduced at Dr. Wilson's deposition, claimant also obtained medical treatment, including epidural steroid injections, from Dr. Patrick D. Griffith. It appears Dr. Griffith practices pain management and saw claimant once each in August, September and October 2003. According to Dr. Griffith's office records, the doctor diagnosed claimant as having L3-4 radiculopathy secondary to a disc protrusion and also spinal canal stenosis at L3-4 and L4-5. On October 24, 2003, Dr. Griffith noted claimant was markedly improved and, therefore,

[1] Wilson Depo., Ex. 3.

there was no need to pursue any further injection therapy or the percutaneous disc decompression that Dr. Wilson had initially considered. Dr. Griffith noted, in part:

> At this time Mr. McCormick is markedly improved. I see no need to pursue any further injection therapy or pursuing percutaneous disc decompression at L3-4. In the event of a future aggravating event to his underlying spinal canal stenosis Mr. McCormick may be helped by transforaminal epidural steroid injections.
>
> I discussed with Mr. McCormick that if his pain does recur that I would be happy to see him again, however, I do not think at that time that it would be a work related injury. Again, he has congenitally shortened pedicles which contribute to his stenosis. He seems to understand this discussion.[2]

Dr. Griffith did not testify, but his office records were also included in the documents that were introduced as exhibits at Dr. Wilson's deposition.

6. Dr. Wilson last saw claimant on November 6, 2003, and his office notes confirm claimant's symptoms had improved, rendering the percutaneous nucleoplasty procedure unnecessary. According to claimant, Dr. Wilson was the last doctor he saw for low back treatment.

7. Using the AMA *Guides*[3] (4th ed.), Dr. Wilson determined claimant had sustained a six percent whole person impairment due to his January 2003 accident and resulting back injury. More importantly, the doctor concluded claimant's back injury did not prevent him from working although claimant should permanently avoid repetitive loads greater than 25 pounds and repetitive bending activities. Dr. Wilson also anticipated claimant might need future over-the-counter anti-inflammatories and additional epidural injections.

8. Claimant, at his attorney's request, was evaluated by board-certified orthopedic surgeon Dr. Edward J. Prostic, who saw claimant twice – first in February 2004 and next in June 2005. The doctor concluded claimant's January 2003 accident aggravated the spinal stenosis in his spine. In addition, the doctor determined claimant should no longer perform 12 of 14, or 86 percent, of the former work tasks identified by vocational rehabilitation expert Monty Longacre and that claimant was

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[2] *Id.*

[3] American Medical Association, *Guides to the Evaluation of Permanent Impairment*.

"essentially totally disabled from gainful employment."[4] Nonetheless, the doctor indicated the restrictions that Dr. Wilson placed on claimant were not much different from those he believed claimant should observe. And, more importantly, Dr. Prostic testified claimant retained the ability to perform sedentary work.

> Q. (Ms. Nye) There are certainly jobs out there in the pool of jobs in the world that fit within the [Dr. Wilson's] restrictions of no repetitive load greater than 25 pounds and no repetitive bending. Correct?
>
> A. (Dr. Prostic) He could probably be a receptionist at a physician's office. He could certainly be an accountant, an attorney, most portions of medicine. Probably wouldn't be able to be a dentist. But there are a lot of things he could do if he had the training and expertise.
>
> Q. And there are plenty of sedentary jobs out there that he, in theory, could do with those physical restrictions from his back injury. Correct?
>
> A. Sure.[5]

9. Dr. Prostic did not provide an opinion regarding claimant's functional impairment rating as measured by the AMA *Guides* (4th ed.). Furthermore, the doctor acknowledged that when he examined claimant he did not place any restrictions on claimant but that he "would restrict him [claimant] against significant lifting, significant pushing and pulling, frequent bending or twisting at the waist, use of vibrating equipment, and captive positioning."[6] And Dr. Prostic determined claimant had an 86 percent task loss using those restrictions. Finally, Dr. Prostic testified that any restrictions claimant would require for his heart or pulmonary conditions would be similar to those claimant should observe for his back.

10. At the March 2005 regular hearing, claimant testified he was then 63 years old. He had not worked since leaving respondent's employment. When claimant's testimony was completed in July 2005, claimant remained unemployed. Claimant explained he began looking for work within a month or so of leaving respondent's employment but that he was unable to find any light duty job. At his July 2005 deposition, claimant introduced a written list of 17 job contacts he had made

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[4] Prostic Depo. at 9.

[5] *Id.* at 25-26.

[6] *Id.* at 24-25.

between May 18, 2005, and July 27, 2005. Claimant allegedly lost the documents that recorded his other job contacts.

11. When he last testified, claimant was receiving Social Security disability benefits. Claimant explained he initially sought early retirement benefits under Social Security as he needed money for health insurance.[7] Nonetheless, claimant's application for retirement benefits was changed to one for Social Security disability benefits after he advised he was unemployed due to a back problem.[8] But, when he last testified, claimant was adamant that neither his heart condition nor his lung condition prevented him from working as he was able to perform manual labor for respondent before his January 2003 back injury. Moreover, claimant testified he could perform light duty work.

> Q. (Ms. Nye) So have you applied for any jobs that fit within your job restrictions?
>
> A. (Claimant) The convenience store was -- at the time, they was not hiring. At the restaurant, they wasn't hiring.
>
> Q. On this list of 15 *[sic]* jobs, one of them is one that you could potentially perform. Correct?
>
> A. Well, if they've got light duty, I can perform a lot of them.[9]

12. Carol Rethemeyer, respondent's employee benefits manager, testified she handles respondent's workers compensation claims and that she met with claimant when he left respondent's employment. According to Ms. Rethemeyer, respondent would have accommodated the medical restrictions claimant received from Dr. Wilson in August 2003 by leaving him in the electric forklift job.[10] According to Ms. Rethemeyer, however, claimant never returned to respondent after he left in July 2003 and respondent did not contact claimant after it received Dr. Wilson's restrictions as claimant had terminated his employment. The record does not establish that respondent had any positions other than the forklift job that respondent considered to be light duty or any position that would not violate claimant's permanent work restrictions.

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[7] McCormick Depo. at 20.

[8] *Id.* at 21.

[9] *Id.* at 10-11.

[10] Rethemeyer Depo. at 13.

13. Claimant, at his attorney's request, was evaluated by vocational rehabilitation expert Monty Longacre. Based upon various medical opinions, including among others Dr. Prostic's opinion that claimant was essentially unemployable and Dr. Healy's opinion that claimant was permanently and totally disabled, Mr. Longacre concluded claimant was unemployable. On the other hand, Mr. Longacre determined claimant retained the ability to earn $6 per hour, or $240 per week, assuming Dr. Wilson's permanent work restrictions were appropriate.

CONCLUSIONS OF LAW

The Board finds and concludes claimant sustained a six percent whole person functional impairment due to his January 29, 2003, low back injury. Dr. Wilson was the only doctor to provide an opinion regarding claimant's permanent functional impairment and, therefore, the Board adopts that opinion.

It appears claimant continued to work for respondent through July 13, 2003, earning at least 90 percent of his pre-injury average weekly wage. Under K.S.A. 44-510e, as quoted below, claimant is entitled to receive permanent disability benefits based upon his whole person functional impairment rating from the date of accident through July 13, 2003, except for those weeks that he received temporary total disability benefits.

The record fails to establish that claimant is permanently and totally disabled from engaging in any substantial and gainful employment. Consequently, claimant's request for permanent total disability benefits under K.S.A. 44-510c is denied. The greater weight of the medical evidence establishes that claimant retains the ability to perform lighter work. The Board construes the testimonies from both Dr. Wilson and Dr. Prostic that claimant is unable to perform the more physical and heavier categories of work, but claimant retains the ability to perform work that is lighter and more sedentary despite his work-related injury and preexisting heart and lung conditions. And, equally important, claimant believes he is able to work.

As claimant has failed to prove he was permanently and totally disabled after he left respondent's employment, he is entitled to receive permanent partial disability benefits under the formula set forth in K.S.A. 44-510e, which provides:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. **The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the**

> **accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment.** Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury. (Emphasis added.)

But that statute must be read in light of *Foulk*[11] and *Copeland*.[12] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered. And in *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages rather than actual wages when the worker failed to make a good faith effort to find appropriate employment.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[13]

The Kansas Court of Appeals in *Watson*[14] held that the failure to make a good faith effort to find appropriate employment does not automatically limit the permanent partial general disability to the functional impairment rating. Instead, the Court reiterated that when a worker failed to make a good faith effort to find employment, the post-injury wage for the permanent partial general disability formula should be based on all the evidence, including expert testimony concerning the capacity to earn wages.

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[11] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[12] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[13] *Id.* at 320.

[14] *Watson v. Johnson Controls, Inc.*, 29 Kan. App. 2d 1078, 36 P.3d 323 (2001).

> In determining an appropriate disability award, if a finding is made that the claimant has not made a good faith effort to find employment, the factfinder *[sic]* must determine an appropriate post-injury wage based on all the evidence before it. This can include expert testimony concerning the capacity to earn wages.[15]

The Board concludes claimant was not able to perform the forklift job that respondent provided claimant. The job required claimant to turn and twist at the waist, which eventually aggravated his symptoms to the point that he could no longer tolerate performing that job. Moreover, the record fails to establish that respondent had any other job that claimant could have performed without violating his permanent work restrictions. The Board concludes claimant was justified in leaving respondent's employment and that he did not abandon an appropriate position.

On the other hand, the Board finds claimant has failed to prove he made a good faith effort to find other work once he left respondent's employment. Accordingly, the Board must impute a post-injury wage for purposes of determining his permanent partial general disability. The only evidence in the record regarding claimant's ability to earn wages comes from Mr. Longacre, who testified that claimant should be able to earn $6 per hour, or $240 per week, considering Dr. Wilson's work restrictions. The Board, therefore, will impute $240 per week for claimant's post-injury wage, which is 56 percent less than claimant's stipulated pre-injury wage of $546.89.

There is only one task loss opinion in the record and that comes from Dr. Prostic, who determined claimant should no longer perform 86 percent of the work tasks that he performed in the 15-year period before his January 2003 accident. The Board, therefore, concludes claimant sustained an 86 percent task loss, which creates a 71 percent permanent partial general disability for the period commencing July 14, 2003.

In summary, claimant should receive the temporary total disability benefits that have been previously provided, followed by a six percent permanent partial general disability through July 13, 2003, followed by a 71 percent permanent partial general disability.

AWARD

WHEREFORE, the Board modifies the October 28, 2005, Award, as follows:

Charles M. McCormick, Sr., is granted compensation from Danisco USA Inc. and its insurance carrier for a January 29, 2003, accident and resulting disability. Based upon

[15] *Id.* at Syl. ¶ 4.

an average weekly wage of $546.89, Mr. McCormick is entitled to receive 12 weeks of temporary total disability benefits at $364.61 per week, or $4,375.32.

For the period ending July 13, 2003, Mr. McCormick is entitled to receive 11.57 weeks of permanent partial general disability benefits at $364.61 per week, or $4,218.54, for a six percent permanent partial general disability.

For the period commencing July 14, 2003, Mr. McCormick is entitled to receive 250.70 weeks of permanent partial general disability benefits at $364.61 per week, or $91,406.14, for a 71 percent permanent partial general disability.

The total award is not to exceed $100,000.

As of February 10, 2006, Mr. McCormick is entitled to receive 12 weeks of temporary total disability compensation at $364.61 per week in the sum of $4,375.32, plus 146.28 weeks of permanent partial general disability compensation at $364.61 per week in the sum of $53,335.15, for a total due and owing of $57,710.47, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of $42,289.53 shall be paid at $364.61 per week until paid or until further order of the Director.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of February, 2006.

_____
BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Steven R. Jarrett, Attorney for Claimant
Tracy M. Vetter, Attorney for Respondent and its Insurance Carrier
Robert H. Foerschler, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director